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No. 14-15

IN THE

Supreme Court of the United States

RICHARD ARMSTRONG, *et al.*,

Petitioners,

v.

EXCEPTIONAL CHILD CENTER, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
STATEMENT	2
SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
I. THE SUPREMACY CLAUSE SUPPORTS A PRIVATE RIGHT OF ACTION TO ENJOIN PREEMPTED STATE LEGISLATION	5
A. A Preemption Claim Arising Directly Under The Supremacy Clause Is Consistent With Original Understanding	6
B. This Court Has Consistently Recognized Preemption Claims Under The Supremacy Clause	10
C. Statutory Authorization Is Not A Prerequisite To A Preemption Claim Under the Supremacy Clause	14
1. Constitutional Claims For Equitable Relief Do Not Require Statutory Authorization	15
2. The Analysis Applied In Statutory Right Of Action Cases Does Not Apply To Constitutional Claims	19
II. THE SUPREMACY CLAUSE SUPPORTS PREEMPTION CLAIMS BASED ON FEDERAL STATUTES ENACTED UNDER THE SPENDING CLAUSE	25

TABLE OF CONTENTS—continued

Page

A. A Preemption Claim Cannot Be Limited Based On The Constitutional Authority Under Which The Federal Statute Was Enacted 25

B. The Structure Of Spending Clause Legislation Does Not Preclude A Preemption Claim 28

CONCLUSION 33

TABLE OF AUTHORITIES

CASES Page

Alexander v. *Sandoval*, 532 U.S. 275 (2001) ..... *passim*
Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234 (1978) 17
Am. Nat'l Red Cross v. *S.G.*, 505 U.S. 247 (1992) 24
Am. Trucking Ass'ns v. *City of L.A.*, 133 S. Ct. 2096 (2013) 2, 11, 28
Ark. Dep't of Health & Human Servs. v. *Ahlborn*, 547 U.S. 268 (2006) 11, 26, 31
Astra USA, Inc. v. *Santa Clara Cnty.*, 131 S. Ct. 1342 (2011) 30
Baker v. *Carr*, 369 U.S. 186 (1962) 16, 24
Barnes v. *Gorman*, 536 U.S. 181 (2002) 28
BellSouth Telecomms., Inc. v. *MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270 (11th Cir. 2003) 11
Bennett v. *Arkansas*, 485 U.S. 395 (1988) 26
Bennett v. *Ky. Dep't of Educ.*, 470 U.S. 656 (1985) 28
Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) 15, 17
Blum v. *Bacon*, 457 U.S. 132 (1982) 5, 26, 27
Bond v. *United States*, 131 S. Ct. 2355 (2011) 3, 4, 18, 25
Bush v. *Lucas*, 462 U.S. 367 (1983) 16
Clallam Cnty. v. *United States*, 263 U.S. 341 (1923) 11
Cannon v. *Univ. of Chi.*, 441 U.S. 677 (1979) 4, 31, 32
Carlson v. *Green*, 446 U.S. 14 (1980) 15, 16
Chamber of Commerce of the United States v. *Brown*, 554 U.S. 60 (2008) 2

TABLE OF AUTHORITIES—continued

Page

Chamber of Commerce of the United States v. *Whiting*, 131 S. Ct. 1968 (2011) 2
Cherokee Nation v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831) 12
City of Burbank v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) 11
Cloverleaf Butter Co. v. *Patterson*, 315 U.S. 148 (1942) 11
Corr. Servs. Corp. v. *Malesko*, 534 U.S. 61 (2001) ..... *passim*
Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) 2, 25, 26
CSX Transp., Inc. v. *Williams*, 406 F.3d 667 (D.C. Cir. 2005) 11
Cummings v. *City of Chi.*, 188 U.S. 410 (1903) 11
Davis v. *Gray*, 83 U.S. (16 Wall.) 203 (1873) 17
Davis v. *Passman*, 442 U.S. 228 (1979) 13, 15
Dobbins v. *Comm'rs of Erie Cnty.*, 41 U.S. (16 Pet.) 435 (1842) 11
Douglas v. *Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204 (2012) 2, 24
Douglas v. *Seacoast Prods., Inc.*, 431 U.S. 265 (1977) 23
Elizabeth Blackwell Health Ctr. For Women v. *Knoll*, 61 F.3d 170 (3d Cir. 1995) 11
Engine Mfrs. Ass'n v. *S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) 27
Fallbrook Irrigation Dist. v. *Bradley*, 164 U.S. 112 (1896) 17
First Nat'l Bank of E. Ark. v. *Taylor*, 907 F.2d 775 (8th Cir. 1990) 11

TABLE OF AUTHORITIES—continued

Page

Fla. Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 (1963) 11
Foster-Fountain Packing Co. v. *Haydel*, 278 U.S. 1 (1928) 17
Free Enter. Fund v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) ... 18, 19, 22
Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992) 2
Golden State Transit Corp. v. *City of L.A.*, 493 U.S. 103 (1989) ..... *passim*
Gonzaga Univ. v. *Doe*, 536 U.S. 273 (2002) 12, 19, 21
GTE N., Inc. v. *Strand*, 209 F.3d 909 (6th Cir. 2000) 11
Hodel v. *Irving*, 481 U.S. 704 (1987) 17
Houston v. *Moore*, 18 U.S. (5 Wheat.) 1 (1820) 11
Hui v. *Castaneda*, 559 U.S. 799 (2010) 16
Ill. Ass'n of Mortgage Brokers v. *Office of Banks & Real Estate*, 308 F.3d 762 (7th Cir. 2002) 11
King v. *Smith*, 392 U.S. 309 (1968) 26, 29
Lawrence Cnty. v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985) ... 11, 14, 26
Local Union No. 12004 v. *Massachusetts*, 377 F.3d 64 (1st Cir. 2004) 11
Loyal Tire & Auto Ctr., Inc. v. *Town of Woodbury*, 445 F.3d 136 (2d Cir. 2006) 11, 22
Maine v. *Thiboutot*, 448 U.S. 1 (1980) 22
Medtronic, Inc. v. *Lohr*, 518 U.S. 470 (1996) 23, 26
Mintz v. *Baldwin*, 289 U.S. 346 (1933) 11
Monroe v. *Pape*, 365 U.S. 167 (1961) 19
Nat'l Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) 24

TABLE OF AUTHORITIES—continued

Page

Osborn v. *Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824) 11, 12, 27
Pac. Gas & Elec. Co. v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) 11
Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1 (1981) 26, 28, 29
Perez v. *Campbell*, 402 U.S. 637 (1971) 11
Pharm. Research & Mfrs. Of Am. v. *Walsh*, 538 U.S. 644 (2003) 2, 11, 27
Planned Parenthood of Houston & Se. Tex. v. *Sanchez*, 403 F.3d 324 (5th Cir. 2005) .. 11
Planned Parenthood of Kan. & Mid-Mo. v. *Moser*, 747 F.3d 814 (10th Cir. 2014) 11
PLIVA, Inc. v. *Mensing*, 131 S. Ct. 2567 (2011) 5, 23, 25, 32
Powell v. *McCormack*, 395 U.S. 486 (1969) .. 17
Qwest Corp. v. *City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004) 11
R.R. Co. v. *Peniston*, 85 U.S. (18 Wall.) 5 (1873) 11
Raines v. *Byrd*, 521 U.S. 811 (1997) 24
Ray v. *Atl. Richfield Co.*, 435 U.S. 151 (1978) 11
Riegel v. *Medtronic, Inc.*, 552 U.S. 312 (2008) 14
Rosado v. *Wyman*, 397 U.S. 397 (1970) 29, 31, 32
Rowe v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008) 2, 11, 27
S.-Cent. Timber Dev., Inc. v. *Wunnicke*, 467 U.S. 82 (1984) 4, 17
Schweicker v. *Chilicky*, 487 U.S. 412 (1988) 16

TABLE OF AUTHORITIES—continued

Page

Shaw v. *Delta Airlines, Inc.*, 463 U.S. 85 (1983) 11, 13
Soc'y for the Propogation of the Gospel v. *Town of New Haven*, 21 U.S. (8 Wheat.) 464 (1823) 11
Swift & Co. v. *Wickham*, 382 U.S. 111 (1965) 14, 16
Townsend v. *Swank*, 404 U.S. 282 (1971) 26
U.S. Steel Corp. v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978) 17
United States v. *Stanley*, 483 U.S. 669 (1987) 16
Va. Office for Prot. & Advocacy v. *Stewart*, 131 S. Ct. 1632 (2011) 13
Verizon Md., Inc. v. *Global NAPS, Inc.*, 377 F.3d 355 (4th Cir. 2004) 11
Verizon Md. Inc. v. *Pub. Serv. Comm'n*, 535 U.S. 635 (2002) 13, 26
Vt. Agency of Natural Res. v. *U.S. ex rel. Stevens*, 529 U.S. 765 (2000) 14
Watters v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007) 2
Weston v. *City Council*, 27 U.S. (2 Pet.) 449 (1829) 11
Wilder v. *Va. Hosp. Ass'n*, 496 U.S. 498 (1990) 31
Wright v. *City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418 (1987) 31
Wyeth v. *Levine*, 555 U.S. 555 (2009) 26
Ex parte Young, 209 U.S. 123 (1908) 12, 13
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 17

TABLE OF AUTHORITIES—continued

CONSTITUTIONS AND STATUTES

Page

Art. of Confed., art. XIII 6
U.S. Const. art. VI, cl. 2 ..... 1, 21, 25
42 U.S.C. § 1983 19

LEGISLATIVE HISTORY

Cong. Globe, 42d Cong., 1st Sess. (1871) 19, 20, 21

SCHOLARLY AUTHORITIES

Section 1983 and Federalism, 90 Harv. L. Rev. 1133 (1977) 19

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TABLE OF AUTHORITIES—continued

Page

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Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225 (2000) 23

Elmer Beecher Russell, *The Review of American Colonial Legislation by the King in Council* (1915) 10

Arthur M. Schlesinger, *Colonial Appeals to the Privy Council*, 28 Pol. Sci. Q. 279 (1913) 10

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David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355 (2004) 7

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OTHER AUTHORITIES

The Debates in the Several State Conventions on the Adoption of the Constitution (Jonathan Elliot ed., 2d ed. 1836) 9

The Federalist No. 33 9

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The Records of the Federal Convention of 1787 (Farrand ed. 1911) ..... *passim*

Restatement (Second) of Contracts (1981) ... 30

TABLE OF AUTHORITIES—continued

Page

James Madison, *Vices of the Political System of the United States*, *in* 9 *The Papers of James Madison* 345 (1975) 6

1 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* (14th ed. 1918) 10

Erwin C. Surrency, *Report on Court Procedures in the Colonies* (1700), *reprinted in* 9 Am. J. of Legal Hist. 167 (1965) 10

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in—or itself initiates—cases that raise issues of vital concern to the Nation's business community.

This is such a case. The Supremacy Clause of the Constitution, which guarantees that federal law "shall be the supreme Law of the Land," U.S. Const. art. VI, cl. 2, serves a vital role in our national economy by protecting federal laws and programs against interference by subordinate governments—thereby eliminating the burdens that such interference places on individuals and businesses. The Chamber's members thus depend on the robust enforcement of the Supremacy Clause to protect against state and local mandates that interfere or conflict with federal law. In this case, petitioners seek to weaken or eliminate a significant, time-tested method for such enforcement: the cause of action for

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[1] No counsel for any party to these proceedings authored this brief, in whole or in part. No entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief. Petitioners and Respondents have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

equitable relief arising directly under the Supremacy Clause.

The Chamber has relied on this cause of action in seeking to vindicate the interests of its members. See, *e.g.*, *Am. Trucking Ass'ns* v. *City of L.A.*, 133 S. Ct. 2096 (2013); *Chamber of Commerce of the United States* v. *Whiting*, 131 S. Ct. 1968 (2011); *Chamber of Commerce of the United States* v. *Brown*, 554 U.S. 60 (2008). It also frequently supports such suits as an *amicus curiae*. See, *e.g.*, *Douglas* v. *Indep. Living Ctr. Of S. Cal., Inc.*, 132 S. Ct. 1204 (2012); *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008); *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Pharm. Research & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644 (2003) (*PhRMA*); *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992). Accordingly, the Chamber and its members have a substantial interest in ensuring that this Court correctly resolves the important issue presented here.

STATEMENT

Two centuries of this Court's precedents support a right of action to enjoin state legislation that is invalid under the Supremacy Clause. *E.g.*, Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts & The Federal System* 903 (5th ed. 2003) (*Hart & Wechsler*). Petitioners and their *amici* offer no persuasive reason why the availability of preemption claims arising under the Supremacy Clause should now be called into question.

They nevertheless argue that, even if these claims exist generally, they should be disallowed in this particular case because the federal Medicaid statute claimed to have been violated does not confer a private right of enforcement. Petrs. Br. 13-15; U.S.

Br. 8-10. The claims in this case do not, however, seek to "enforce" the statute, or to assert rights granted thereunder. Rather, they seek to vindicate the structural, constitutional interest in the supremacy of national laws. That interest is enforceable in the federal judiciary as a matter of constitutional law, as this Court has "long ... recognized." *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001); see also *Bond* v. *United States*, 131 S. Ct. 2355, 2364-66 (2011). Statutory enforcement procedures may provide alternative (and often expanded) means by which state violations of federal law can be addressed, but those procedures do not displace a right of action for equitable relief under the Supremacy Clause.

SUMMARY OF THE ARGUMENT

The claims in this case, to enjoin Idaho from enforcing preempted state law, are supported by a long and unbroken line of precedent recognizing an equitable right of action under the Constitution to address ongoing constitutional violations. *E.g.*, *Malesko*, 534 U.S. at 74. There is no basis to weaken or eliminate the constitutional cause of action which these claims, and many others like them, raise.

1. It is "well-established" that the Constitution itself supports a right of action seeking prospective equitable relief to address constitutional violations. *Hart & Wechsler*, *supra*, at 903. Scores of this Court's opinions have recognized such claims, and never has this Court suggested that this constitutional right of action depends for its existence on congressional authorization. *Infra* Part I. Such a prerequisite would be inconsistent with this Court's approach to other structural constitutional provisions that, like the Supremacy Clause, always have been understood to support claims for prospective equitable relief

without need for an authorizing statute. *E.g.*, *S.-Cent. Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 87 (1984); see also *Bond*, 131 S. Ct. at 2364-66.

Reaffirming the longstanding recognition of this constitutional right of action would not be an "'end run'" (Petrs. Br. 19) around this Court's decisions requiring "rights-creating" language as a precondition to statutory causes of action. *Infra* Part I.C.2. Claims seeking to enforce a *statute*, whether 42 U.S.C. § 1983 or any other, arise under the statute and thus are available only when authorized thereby. *E.g.*, *Golden State Transit Corp.* v. *City of L.A.*, 493 U.S. 103, 106 (1989). Claims seeking to enforce the *Constitution*, by contrast, arise as a necessary incident of the constitutional structure. *E.g.*, *S.-Cent. Timber*, 467 U.S. at 87; see also *Golden State*, 493 U.S. at 116-17 (Kennedy, J., dissenting); *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 733 n.3 (1979) (Powell, J., dissenting). Whatever role Congress may have in crafting adjudicatory mechanisms and remedies for constitutional claims, the Constitution itself empowers the judiciary to entertain suits alleging ongoing constitutional violations, including violations of the Supremacy Clause, and to abate them when appropriate through prospective equitable relief.

2. This right of action is no less available when the preemption claim implicates a federal statute enacted under authority of the Spending Clause. *Infra* Part II.A. The constitutional basis for the federal statute has never been held relevant to an inquiry into whether a state law is preempted, or to the antecedent question of whether a cause of action is available. To the contrary, this Court repeatedly has upheld equitable relief on claims that alleged a conflict between state legislation and requirements of

federal spending programs. See, *e.g.*, *Blum* v. *Bacon*, 457 U.S. 132, 145-46 (1982).

The possibility that federal funding might be withdrawn does not eliminate individual preemption claims. *Infra* Part II.B. So long as the State participates in the federal program, it is subject to the conditions imposed by federal law, and conflicting state legislation is void whether or not it is "possible" that the conflict might be avoided by a future change in circumstances. *PLIVA, Inc.* v. *Mensing*, 131 S. Ct. 2567, 2579 (2011). Regardless of what remedies might be available to the federal government to vindicate its own interest in enforcing federal law, individuals and businesses injured by unconstitutional state legislation retain the right to seek prospective equitable relief in federal court.

ARGUMENT

I. THE SUPREMACY CLAUSE SUPPORTS A PRIVATE RIGHT OF ACTION TO ENJOIN PREEMPTED STATE LEGISLATION.

It has long been accepted, as the United States acknowledges, U.S. Br. 15-17, that the Supremacy Clause supports a claim for individuals and businesses to challenge preempted state legislation. *Hart & Wechsler*, *supra*, at 903; see also 13D Charles A. Wright et al., *Federal Practice and Procedure* § 3566, at 289-92 (3d ed. 2008). That principle, although disputed by petitioners, Petrs. Br. 35-39, accords with the original understanding of the Supremacy Clause, and two centuries of caselaw thereafter, as well as this Court's decisions in statutory rights cases.

A. A Preemption Claim Arising Directly Under The Supremacy Clause Is Consistent With Original Understanding.

There is no evidence that the Framers would have thought that individuals adversely affected by preempted state legislation would be unable to seek equitable relief from the federal judiciary. To the contrary, the historical record suggests that they expected and intended such a right of action to be available.

1. The Framers' principal objective in crafting the Supremacy Clause was to establish an effective mechanism by which States could be compelled to comply with federal law. Christopher R. Drahozal, *The Supremacy Clause* 6-7 (2004); see also, *e.g.*, 3 *The Records of the Federal Convention of 1787*, at 524-29 (Farrand ed. 1911) (Farrand). Although the Articles of Confederation had declared the principle of national supremacy and directed the States to "abide by" and "inviolably observe[ ]" national law, Art. of Confed., art. XIII, they provided no method to enforce that principle, with the result that several States enacted legislation or exercised powers (such as negotiating treaties with foreign countries) in direct contravention of national law. Drahozal, *supra*, at 6-7; see also James Madison, *Vices of the Political System of the United States*, *in* 9 *The Papers of James Madison* 345, 348-58 (1975).

To remedy this defect, each plan offered at the Constitutional Convention would have given authority to one or more branches of the federal government to invalidate state legislation that was inconsistent with national policy—and, when necessary, to compel compliance. See 3 Farrand, *supra*, at 524-29; see also Drahozal, *supra*, at 6-7. For instance, one plan, offered by the delegates from

New Jersey, would have allowed the executive to call forth the military against a recalcitrant State, 1 Farrand, *supra*, at 245; another, associated with the Virginia delegation, would have vested in Congress the power to "negative" state legislation deemed inconsistent with national law, *id.* at 21, 54, 164-65. The proposal ultimately adopted, embodied in the Supremacy Clause, shared the same purpose as other plans but delegated responsibility for enforcing national supremacy to the judiciary. *E.g.*, *id.* at 168, 313, 322; 2 Farrand, *supra*, at 28-29, 144, 169, 183, 389-91, 417, 603; see also 3 Farrand, *supra*, at 524-29; Drahozal, *supra*, at 20-23.

A private right of action to challenge preempted state legislation is necessary to allow the judiciary to satisfy this constitutional purpose. State legislation can be presented to federal courts only in the context of "cases" or "controversies," *e.g.*, 2 Farrand, *supra*, at 430, and the parties most able to bring these cases—in modern terms, those with "standing"—are those adversely affected by the state legislation. See, *e.g.*, David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 401-03 (2004). Without a right of action, there would be no mechanism by which unconstitutional state laws could be addressed, except where the State itself elected to bring an enforcement action in the courts, thereby implicating the Supremacy Clause as a defense.

It is inconceivable, given the Framers' then-recent experience under the Articles of Confederation, *e.g.*, 1 Farrand, *supra*, at 166-67, 316-17, 326, that they would have intended the enforcement of national supremacy to depend on voluntary action by the States. Nor would they likely have viewed the Supremacy Clause as nothing more than a "rule of

decision," Petrs. Br. 36, directing States to follow national law—as had the Articles previously—but giving the federal courts no actual authority to invalidate unconstitutional state legislation. See, *e.g.*, James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696, 762 (1998). The Framers understood and intended that the federal judiciary would be open to individuals injured by unconstitutional state legislation and empowered to declare state legislation invalid and to prospectively enjoin its enforcement. See, *e.g.*, Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. Rev. 681, 706-07 (2009).

2. This understanding is reflected in the Convention and ratification debates. Throughout those proceedings, the Supremacy Clause was consistently described as giving judges authority affirmatively to "set aside" and "declare void" (not merely "decline to enforce") state legislation that contravenes federal law. *E.g.*, 2 Farrand, *supra*, at 27-28, 391. Although constitutional remedies and rights of action were not a focus of the Convention, see Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1779 (1991), several delegates expressed the understanding that the federal judiciary should entertain claims by "any individual conceiving himself injured or oppressed by the partiality or injustice of a law of any particular State," 3 Farrand, *supra*, at 55-56 (Randolph), and that federal judges, when presented with an unconstitutional state law, would be able to grant prospective equitable relief in the form of a

"supersedeas," *id.* at 524-29 (Madison).[2] During the ratification debates, both supporters and opponents of the Constitution assumed that the *federal* judiciary would be empowered "in the first instance" to decide the constitutionality of state laws—presumably in actions commenced by individuals, as it would have been unlikely for a State to bring an enforcement action in federal court. *Id.* at 286-87; see also *id.* at 205-07; 3 *The Debates in the Several State Conventions on the Adoption of the Constitution* 266 (Jonathan Elliot ed., 2d ed. 1836).

This is consistent with the views set forth in *The Federalist Papers*. Petitioners' *amici* rely (Br. of Nat'l Gov. Ass'n 21-22) on a statement by Alexander Hamilton that the Supremacy Clause "only declares a truth, which flows immediately and necessarily from the institution of a federal government." *The Federalist No. 33* (Hamilton). But Hamilton never suggested that this "truth" was an unenforceable one. On the contrary, given the views expressed elsewhere by both Hamilton and Madison, this statement suggests that they understood a right of action to challenge unconstitutional state statutes to be inherent in the constitutional structure, just as they understood the right of judicial review of federal legislation to be inherent in that same structure. See *The Federalist No. 44* (Madison); *The Federalist No. 80* (Hamilton).

This understanding fits squarely within contemporary legal practice. At the time of the

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[2] The proposal by Edmund Randolph would have allowed the judiciary to invalidate not only state legislation found to be inconsistent with federal law but also any state laws deemed "contrary to the principles of equity and justice." 3 Farrand, *supra*, at 55-56; *see also* 1 Farrand, *supra*, at 97-98; 2 Farrand, *supra*, at 73-80.

Founding, colonial and English judicial practice permitted individuals to seek redress in equity for injuries resulting from an *ultra vires* act or void law. Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 Wash. L. Rev. 429, 437-50 (2003).[3] For example, the English Board of Trade accepted and addressed petitions from colonists challenging local acts as inconsistent with English law. *E.g.*, Elmer Beecher Russell, *The Review of American Colonial Legislation by the King in Council* 50-52 (1915). The English Privy Council adjudicated appeals by colonists alleging that local provisions were "repugnant" to English law. *E.g.*, Arthur M. Schlesinger, *Colonial Appeals to the Privy Council*, 28 Pol. Sci. Q. 279, 287-88 (1913). Petitioners' *amici* seek to downplay these procedures as "fundamentally political and administrative in nature," Br. of Nat'l Gov. Ass'n 15, but do not explain why these analogous practices would not have informed the Framers' understanding of the role of the judiciary in reviewing local legislation. *E.g.*, 1 Farrand, *supra*, at 105, 138-40; 2 Farrand, *supra*, at 73-80 (referring to English practice in addressing judicial review).

B. This Court Has Consistently Recognized Preemption Claims Under The Supremacy Clause.

Consistent with this understanding, for nearly 200 years the Court has addressed claims seeking equitable relief against the operation of a preempted state law. *Hart & Wechsler*, *supra*, at 903. There are

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[3] *See generally* Erwin C. Surrency, *Report on Court Procedures in the Colonies* (1700), *reprinted in* 9 *American Journal of Legal History* 167, 176 (1965); 1 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* (14th ed. 1918).

scores of such cases in this Court alone, just a sampling of which are set forth in the margin,[4] and in the federal courts of appeals.[5] These cases were

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[4] *See, e.g.*, *Am. Trucking*, 133 S. Ct. 2096; *Rowe*, 552 U.S. 364; *Ark. Dep't of Health & Human Servs.* v. *Ahlborn*, 547 U.S. 268 (2006); *PhRMA*, 538 U.S. 644; *Gade*, 505 U.S. 88; *Lawrence Cnty.* v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985); *Shaw* v. *Delta Airlines, Inc.*, 463 U.S. 85 (1983); *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983); *Ray* v. *Atl. Richfield Co.*, 435 U.S. 151 (1978); *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Perez* v. *Campbell*, 402 U.S. 637 (1971); *Fla. Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148 (1942); *Mintz* v. *Baldwin*, 289 U.S. 346 (1933); *Clallam Cnty.* v. *United States*, 263 U.S. 341 (1923); *Cummings* v. *City of Chi.*, 188 U.S. 410 (1903); *R.R. Co.* v. *Peniston*, 85 U.S. (18 Wall.) 5 (1873); *Osborn* v. *Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824); *cf. Dobbins* v. *Comm'rs of Erie Cnty.*, 41 U.S. (16 Pet.) 435 (1842); *Weston* v. *City Council*, 27 U.S. (2 Pet.) 449 (1829); *Soc'y for the Propogation of the Gospel* v. *Town of New Haven*, 21 U.S. (8 Wheat.) 464 (1823); *Houston* v. *Moore*, 18 U.S. (5 Wheat.) 1 (1820).

[5] *See, e.g.*, *Loyal Tire & Auto Ctr., Inc.* v. *Town of Woodbury*, 445 F.3d 136, 149 (2d Cir. 2006); *CSX Transp., Inc.* v. *Williams*, 406 F.3d 667, 672-74 (D.C. Cir. 2005) (per curiam); *Planned Parenthood of Houston & Se. Tex.* v. *Sanchez*, 403 F.3d 324, 330-35 (5th Cir. 2005); *Qwest Corp.* v. *City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004); *Verizon Md., Inc.* v. *Global NAPS, Inc.*, 377 F.3d 355, 368-69 (4th Cir. 2004); *Local Union No. 12004* v. *Massachusetts*, 377 F.3d 64, 75 (1st Cir. 2004); *BellSouth Telecomms., Inc.* v. *MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1277-78 (11th Cir. 2003) (en banc); *Ill. Ass'n of Mortgage Brokers* v. *Office of Banks & Real Estate*, 308 F.3d 762, 765 (7th Cir. 2002); *GTE N., Inc.* v. *Strand*, 209 F.3d 909, 916 (6th Cir. 2000); *Elizabeth Blackwell Health Ctr. For Women* v. *Knoll*, 61 F.3d 170, 185 (3d Cir. 1995); *First Nat'l Bank of E. Ark.* v. *Taylor*, 907 F.2d 775, 776 n.3 (8th Cir. 1990). *But see Planned Parenthood of Kan. & Mid-Mo.* v. *Moser*, 747 F.3d 814, 822-23 (10th Cir. 2014) (rejecting, in a panel decision, circuit precedent recognizing right of action under Supremacy Clause).

decided in each critical period in the evolution of enforcing constitutional claims against state actors—including, among others, the eras shortly after the Founding; before and after the Civil War and the enactment of § 1983; and throughout the Twentieth Century, both before and after this Court's decisions in statutory rights cases such as *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002) and *Alexander* v. *Sandoval*, 532 U.S. 275 (2001).

As early as 1824, in *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), the Court held that an entity could seek equitable relief against a state official acting under a state law preempted by the Supremacy Clause. *Id.* at 838. The Court expressly rejected the argument (similar to that offered by petitioners here, Petrs. Br. 36-39) that an individual who "perceives the approaching danger" of an invalid state law "can obtain no protection from the judicial department of the government." 22 U.S. (9 Wheat.) at 847. This Court instead held that it is the "province of [the judiciary], in such cases, to arrest the injury, and prevent the wrong." *Id.* at 845, 847.

Subsequent cases continued to adjudicate claims for equitable relief directly under provisions of the Constitution, including the Supremacy Clause. See *supra* note 4. These include, among others, the landmark decision in *Ex parte Young*, 209 U.S. 123 (1908), which upheld an individual's claim to enjoin state officials from enforcing an unconstitutional state law. *Id.* at 145-65. Indeed, the decision went out of its way to note the long history of such claims in the federal courts. *Id.* at 145-52.[6] And, of course,

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[6] *See also Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 75-80 (1831) (Thompson, J., dissenting) (a claim for equitable relief against a preempted state law "presents a case for judicial

the very purpose of *Young* was to preclude States from deterring potential plaintiffs from protecting their constitutional rights by threatening to penalize them for non-compliance with the State's unconstitutional requirement. See *id.* By holding that the private party could go to court to enforce the Constitution against state officials, this Court rejected the argument that constitutional provisions are enforceable only as a defense to an enforcement action.

Through the last century and into this one, and despite changing views of the meaning and relevance of the phrase "cause of action," *e.g.*, *Davis* v. *Passman*, 442 U.S. 228, 236-44 (1979), this Court repeatedly has entertained affirmative claims to enjoin state officials from implementing preempted state legislation. *E.g.*, *Verizon Md. Inc.* v. *Pub. Serv. Comm'n*, 535 U.S. 635, 642-43 (2002); see also *Va. Office for Prot. & Advocacy* v. *Stewart*, 131 S. Ct. 1632, 1638-39 (2011).[7] In *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983), for example, the Court held that "[a] plaintiff who seeks injunctive relief from state regulation[ ] on the ground that such regulation is pre-empted [under] the Supremacy Clause ... presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Id.* at 96 n.14. These decisions "reaffirm[ ] the general rule" that equitable relief is available in

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consideration, arising under the laws of the United States," and "an injunction is a fit and proper writ to be issued, to prevent the further execution of such [state] law[ ]").

[7] *See also supra* note 4; Robert Bruce Scott, *The Increased Control of State Activities by the Federal Courts*, 3 Am. Pol. Sci. Rev. 347 (1909); John E. Lockwood et al., *The Use of the Federal Injunction in Constitutional Litigation*, 43 Harv. L. Rev. 426 (1930).

federal court to enjoin state officers from implementing preempted state law. *Lawrence Cnty.* v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 259 n.6 (1985).

To be sure, many of these decisions assumed the existence of a claim under the Supremacy Clause, while focusing directly on questions of jurisdiction or the like. See, *e.g.*, *Swift & Co.* v. *Wickham*, 382 U.S. 111, 114-29 (1965). But, it cannot be disputed that these cases reflect an unbroken history of allowing individuals to "vindicate ... pre-emption claims by seeking declaratory and equitable relief in the federal district courts." *Golden State*, 493 U.S. at 119 (Kennedy, J., dissenting); cf. *Vt. Agency of Natural Res.* v. *U.S. ex rel. Stevens*, 529 U.S. 765, 773-78 (2000) (concluding that the "long tradition" of "routinely entertain[ing]" *qui tam* actions was "well nigh conclusive" of those claims' justiciability). To hold otherwise would cast doubt upon, if not directly overrule, the holdings of these cases and scores others. What this history also reveals is that a direct action under the Supremacy Clause has promoted rather than interfered with a properly functioning federalist regime because preemption requires clear intent to oust state law, *e.g.*, *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 334 (2008), but when it exists there is a remedy available to the party injured by that law.

C. Statutory Authorization Is Not A Prerequisite To A Preemption Claim Under the Supremacy Clause.

In none of the cases discussed above did this Court demand "rights-creating" or other authorizing statutory language as a prerequisite to a right of action under the Supremacy Clause. See *supra* note 4. Such a requirement would run counter to a large corpus of cases approving direct claims under other

provisions of the Constitution and is not mandated by statutory rights cases such as *Gonzaga* and *Sandoval*.

1. Constitutional Claims For Equitable Relief Do Not Require Statutory Authorization.

Claims arising directly under provisions of the Constitution have "long been recognized" by this Court, without need for statutory authorization. *Malesko*, 534 U.S. at 74. Whatever role Congress has in defining and limiting the scope of remedies that are available in these actions, particularly with respect to monetary damages, a claim seeking purely equitable relief to abate an ongoing constitutional violation arises as a necessary incident of the Constitution.

a. This principle underlies *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and its progeny. That case, and those that followed from it, held that an individual whose constitutional rights are infringed by a federal official may bring an action in federal court for monetary damages. *Id.* at 392-97; see also *Carlson* v. *Green*, 446 U.S. 14, 19-21 (1980); *Davis*, 442 U.S. at 245-49. No statute authorized these actions, and in some cases Congress had provided alternative remedial schemes for the violations at issue. *E.g.*, *Green*, 446 U.S. at 19-21. Nevertheless, this Court reasoned that a damages remedy should be available to individuals injured by constitutional violations committed by federal officials, in part because 42 U.S.C. § 1983 provides a comparable remedy for violations committed by state officials. *Id.* at 21-22 & n.6, 24-25.

The availability of a *damages* remedy for constitutional claims has, of course, been circumscribed in the years since *Bivens*, and for good reasons. *E.g.*, *Malesko*, 534 U.S. at 68. A damages remedy is retrospective in nature, intended to compensate the injured party and deter future violations, and is not strictly necessary to abate an ongoing constitutional violation. *Green*, 446 U.S. at 19-21. For those reasons, the Court generally has limited it to circumstances in which the violation could not otherwise be addressed, and has held it unavailable when Congress provided a "meaningful" and "effective" alternative remedial scheme—even if the relief available under that scheme is not precisely the same. *E.g.*, *Schweicker* v. *Chilicky*, 487 U.S. 412, 425 (1988); *Bush* v. *Lucas*, 462 U.S. 367, 385-86 (1983); see also *Hui* v. *Castaneda*, 559 U.S. 799, 808 (2010).

The Court consistently has reaffirmed, however—even when disallowing a damages claim under *Bivens*—that claims for equitable relief remain fully available. *Malesko*, 534 U.S. at 74; *United States* v. *Stanley*, 483 U.S. 669, 682-83 (1987); see also, *e.g.*, *Green*, 446 U.S. at 39 (Rehnquist, J., dissenting). Such claims exist and retain their vitality as a matter of constitutional structure and necessity. See *Stanley*, 483 U.S. at 683 (claims for equitable relief "[do] not ask the Court to imply a new cause of action") (quoting *Chappell* v. *Wallace*, 462 U.S. 296, 305 n.2 (1983)). While Congress may by statute prescribe procedures for the adjudication and review of constitutional claims, see, *e.g.*, *Swift*, 382 U.S. at 114-15 (three-judge panels), and justiciability doctrines may independently restrict their availability in particular circumstances, see, *e.g.*, *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), prospective equitable

relief is "presumed availab[le] ... against threatened invasions of constitutional interests." *Bivens*, 403 U.S. at 404 (Harlan, J., concurring).

b. Cases outside the *Bivens* context likewise recognize "direct" constitutional claims seeking equitable relief for violations of the Constitution. *Malesko*, 534 U.S. at 74. Contrary to petitioners' argument, these claims have been approved not only for constitutional provisions that represent an affirmative "source of ... federal rights," Petrs. Br. 37, but also those—like the Supremacy Clause—that define the structural relationship between the state and federal governments.

In fact, there are numerous cases in which this Court has addressed claims arising directly under "structural" provisions of the Constitution. These include, among others, claims under the Qualifications and Compact Clauses, *e.g.*, *U.S. Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 458 (1978); *Powell* v. *McCormack*, 395 U.S. 486 (1969), as well as under more abstract constitutional principles such as separation of powers, *e.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952).[8] These cases confirm that "structural" provisions of the Constitution, no less than "rights-creating" ones, are enforceable through direct actions in federal courts.

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[8] *See also, e.g.*, *Hodel* v. *Irving*, 481 U.S. 704 (1987) (Takings Clause); *S.-Cent. Timber*, 467 U.S. 82 (Dormant Commerce Clause); *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978) (Contracts Clause); *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1 (1928) (Dormant Commerce Clause); *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U.S. 112 (1896) (Takings Clause); *Davis* v. *Gray*, 83 U.S. (16 Wall.) 203 (1873) (Contracts Clause).

This principle was strongly reaffirmed in a pair of this Court's recent decisions. In *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), the Court expressly upheld "an implied private right of action directly under the Constitution to challenge governmental action under the Appointments Clause or separation-of-powers principles." *Id.* at 491 n.2. It noted that a right to equitable relief for a constitutional violation "has long been recognized" and "[exists] as a general matter, without regard to the particular constitutional provisions at issue." *Id.* (quoting *Malesko*, 534 U.S. at 74).

In *Bond* v. *United States*, 131 S. Ct. 2355 (2011), this Court similarly held that "structural" constitutional provisions like the Tenth Amendment—which do not confer individual "rights" but rather define the relationship between federal and state governments—are nevertheless intended to "protect[ ] the liberty of ... persons" and for that reason may be asserted by an individual in a challenge to government action. *Id.* at 2364-65. In language particularly relevant here, the Court explained that, "[j]ust as it is appropriate for an individual, in a proper case, to invoke separation-of-powers or check-and-balances constraints, so too may a litigant, in a proper case, challenge a law as enacted in contravention of constitutional principles of federalism." *Id.*

These opinions reject the distinction that petitioners would draw between rights-creating and structural provisions of the Constitution. Petrs. Br. 17-19. On the contrary, they properly recognize that the Constitution's structural provisions fundamental purpose is to protect individual liberties. *Bond*, 131 S. Ct. at 2363-64. That is equally true of the

Supremacy Clause. The Court's decisions also explicitly recognize that negative restrictions on governmental power, like the Supremacy Clause, can support a challenge against government action and a claim for prospective equitable relief to abate an ongoing constitutional violation. *Free Enter.*, 561 U.S. at 491 n.2. In arguing that the Supremacy Clause "should be treated differently than every other constitutional claim," petitioners—like the parties in *Free Enterprise* and *Bond*—"offer[ ] no reason and cite[ ] no authority why that might be so." *Id.* That is because no reason exists.

2. The Analysis Applied In Statutory Right Of Action Cases Does Not Apply To Constitutional Claims.

"Rights-creating" language is not a prerequisite to claims asserted directly under the Constitution, including preemption claims under the Supremacy Clause. That requirement is applied to claims under 42 U.S.C. § 1983, see *Gonzaga*, 536 U.S. at 282, and claims implied under federal statutes, see *Sandoval*, 532 U.S. at 286, but it has never been—and, contrary to petitioners' argument, Petrs. Br. 18-19, cannot be—applied to constitutional claims.

a. The remedy provided by § 1983 has, since its enactment, been understood to supplement and complement—but not to supplant—equitable relief already available through a claim under the Constitution itself. *E.g.*, *Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1154, 1170 (1977); see also *Monroe* v. *Pape*, 365 U.S. 167, 173 (1961). Throughout the debates on the bill that would become § 1983, legislators explained that the statute would offer "*further* redress for violations ... of constitutional rights" and an "*additional*" remedy for individuals injured thereby. Cong. Globe, 42d Cong.,

1st Sess. app. 315, 460 (1871) (emphasis added); see, *e.g.*, *id.* at 374, 429, 653. There is no evidence that Congress intended § 1983 to limit or disturb the traditional scope of preemption claims under the Supremacy Clause. To the contrary, supporters and opponents of the bill recognized the historical propriety of claims seeking prospective injunctive relief for constitutional violations, including actions to void unconstitutional state laws. *E.g.*, *id.* at app. 259 ("[T]he remedy [for a State's violation of the Constitution is that t]he Federal courts ... declare[ ] the statute null and void."); see also, *e.g.*, *id.* at app. 83, app. 221, app. 259, app. 315, 429.

This distinction finds further support in the fact that § 1983 was deemed necessary precisely because it addressed a different class of harms—injuries to federally conferred "rights"—than those remedied by a claim for injunctive relief under the "negative limitations" of the Constitution. *Id.* at app. 83. As one of the bill's sponsors explained:

> [Constitutional] prohibitions upon the political powers of the States are all of such nature that they can be ... enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers. Thus, and thus sufficiently, has the United States "enforced" those provisions of the Constitution. But there are some that are not of this class. These are where the court secures the rights or the liabilities of persons within the States, as between such persons and the States.... [T]hese [are] the only provisions where it was deemed that legislation was required to enforce the[m] ....

Id. at app. 69; see also *id.* at app. 70. Prospective equitable relief often is not an effective remedy for a completed infringement of an individual's personal

"rights," and for that reason a damages remedy was provided in § 1983, both to compensate the individual and to deter future violations.[9] *E.g.*, *id.* at app. 50.

This rationale has been understood to justify limiting claims under § 1983 (and analogous claims under *Bivens*) to deprivations of federally conferred "rights," *Gonzaga*, 536 U.S. at 285-90, but it has no application to direct constitutional claims for prospective equitable relief. Whereas § 1983 by its terms protects only "rights" guaranteed to individuals under federal law, *id.*, the Supremacy Clause declares broadly that "any Thing in the Constitution or Laws of any State" contrary to the "Constitution[ ] and the Laws of the United States" shall be invalid, without regard to whether the provisions at issue confer "rights." U.S. Const., art. VI, cl. 2; see *Golden State*, 493 U.S. at 117 (Kennedy, J., dissenting) ("Pre-emption [does not] concern[ ] ... the securing of rights, privileges, and immunities to individuals.").

To be sure, as the United States points out, *some* preemption claims might also be brought under § 1983 because they implicate a particular "right" guaranteed by federal law. U.S. Br. 28-29. But the availability of that particular avenue of relief is no reason to hold that § 1983 displaces constitutional

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[9] The three statements cited by petitioners' *amicus*, far from showing that the framers of § 1983 "believed that its equitable remedies were *new*," Br. of Nat'l Gov. Ass'n 33, establish only that they believed that equitable remedies, in addition to monetary damages, could and should be provided under § 1983 to protect against a violation of federally guaranteed "rights." *See* Cong. Globe, 42d Cong., 1st Sess. at 501 (noting that Congress has authority to enact § 1983, to provide "an original action in our Federal courts [for an] injunction [or] recovery of damages"); *see also id.* at 577 (referring to need to protect federally guaranteed "rights"); *id.* at 376 (same).

preemption claims, any more than it displaces the myriad other constitutional claims that "ha[ve] long been recognized" to coexist with § 1983 (and *Bivens*) claims.[10] *Malesko*, 534 U.S. at 74. And, contrary to the United States' assertion, U.S. Br. 28-29, not all constitutional preemption claims could simply be restyled as § 1983 claims, or vice versa. See, *e.g.*, *Golden State*, 493 U.S. at 107-08; *Loyal Tire & Auto Ctr., Inc.* v. *Town of Woodbury*, 445 F.3d 136, 149 (2d Cir. 2006). There is no basis to restrict preemption claims under the Supremacy Clause to those based on a "rights-creating" statute.

b. Much the same can be said for petitioners' argument that constitutional preemption claims should be allowed only when authorized by the underlying federal statute, under the rationale of implied rights of action cases like *Sandoval*. Petrs. Br. 18-35. Because the claims at issue in those cases were brought directly under *statutes*, the scope and availability of any cause of action depended on the statute itself. *E.g.*, *Sandoval*, 532 U.S. at 286. Claims under the Supremacy Clause, by contrast, are brought under *the Constitution* and exist as a necessary incident of the Constitution's structure. See, *e.g.*, *Free Enter.*, 561 U.S. at 491 n.2; see also *Malesko*, 534 U.S. at 74.

Petitioners' position rests on the flawed premise that a preemption claim seeks to "enforce" a federal statute. *E.g.*, Petrs. Br. 24-27; U.S. Br. 30. Although

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[10] The statement in *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), that when a statute provides no private right of enforcement § 1983 represents the "exclusive statutory cause of action," *id.* at 6, does not on its face suggest that § 1983 is the exclusive vehicle for *non-statutory* claims, *contra* Petrs. Br. 24-25; U.S. Br. 25-26, and *Thiboutot* never has been read to support displacement of constitutional claims for equitable relief.

a preemption claim commonly relies for its substance on the scope of a federal statute—to determine, for instance, whether the challenged state legislation impermissibly conflicts with federal law, see *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485-86 (1996)—it does not seek to "enforce" the statute, as would a claim asserting an implied statutory right of action, *Sandoval*, 532 U.S. at 286. Rather, what is "enforced" in a preemption claim is the structural constitutional principle of supremacy, as declared in the Supremacy Clause. *E.g.*, *Douglas* v. *Seacoast Prods., Inc.*, 431 U.S. 265, 271-72 (1977) (preemption is "basically constitutional in nature, deriving its force from the operation of the Supremacy Clause"); see also Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 234 (2000).

It is therefore no answer to contend, as petitioners do, that the equitable relief sought here is unavailable because "equity follows the law." Petrs. Br. 47 (quoting *Douglas*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting)). The "law" to be enforced in this case is not the statute, but the Constitution itself. See, *e.g.*, *PLIVA*, 131 S. Ct. at 2579-80 (Thomas, J.); cf. U.S. Br. 10 ("The question in this case ... does not concern the States' substantive [statutory] obligations ... "). Because it is the Constitution that supports a right of action for these claims, the availability of that right does not depend upon whether the underlying statute might also provide one.

Moreover, reaffirming the longstanding rule that preemption claims may be brought directly under the Constitution will not undermine congressional expectations regarding the operation of federal law, as petitioners suggest. Petrs. Br. 27-35. This is for the simple reason that courts uniformly have

recognized the availability of claims under the Supremacy Clause for two centuries. See *supra* notes 4-5. Congress is presumed to legislate against the settled backdrop of this existing law, see, *e.g.*, *Am. Nat'l Red Cross* v. *S.G.*, 505 U.S. 247, 252, 260 (1992), and respondents merely ask this Court to confirm what is already "well-established." *Hart & Wechsler*, *supra*, at 903. In contrast, it is *petitioners* who ask this Court to eliminate an avenue for relief that Congress must have understood was available when it chose not to provide an additional statutory remedy.

For much the same reason, petitioners are unfounded in their concern that courts, by continuing to recognize the preemption right of action, improperly will arrogate to themselves decision-making authority from the expert agencies. Petrs. Br. 27-31. Reaffirming a long-extant right of action works no change on the agencies, which remain free to exercise the discretion delegated to them regardless how the courts interpret ambiguous federal statutes. See *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 983-84 (2005); see also *Douglas*, 132 S. Ct. at 1210-11. In all events, justiciability doctrines properly will limit the scope of potential plaintiffs able to bring these challenges.[11]

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[11] For example, political questions will be dismissed as non-justiciable, *e.g.*, *Baker*, 369 U.S. at 217, and plaintiffs suffering no injury-in-fact from the challenged government action will lack standing under Article III, e.g., *Raines* v. *Byrd*, 521 U.S. 811, 821-26 (1997).

II. THE SUPREMACY CLAUSE SUPPORTS PREEMPTION CLAIMS BASED ON FEDERAL STATUTES ENACTED UNDER THE SPENDING CLAUSE.

Petitioners and the United States argue in the alternative that, even if preemption claims generally are available under the Supremacy Clause, they should be precluded when the underlying federal statute was enacted to reimburse States' spending under authority of the Spending Clause. Petrs. Br. 49-54; U.S. Br. 21-23. That rule finds no support in this Court's decisions, and is at odds with the constitutional principle of supremacy.

A. A Preemption Claim Cannot Be Limited Based On The Constitutional Authority Under Which The Federal Statute Was Enacted.

The Supremacy Clause declares simply that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof," shall be "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. It does not distinguish between federal statutes based on which constitutional provision authorized Congress to act, and this distinction has never played a role in preemption analysis. See, *e.g.*, *Crosby*, 530 U.S. at 372; see also *PLIVA*, 131 S. Ct. at 2579-80 (Thomas, J.). It thus would do violence to the Constitution's text to import this limitation into the capacious language the Framers adopted. Nor is this distinction relevant to whether a preemption claim is available. Such a claim seeks not to "enforce" the underlying statute, but to vindicate the federal structural interest in supremacy. See *Golden State*, 493 U.S. at 119 (Kennedy, J., dissenting); *Bond*, 131 S. Ct. at 2365. That constitutional interest is enforceable in the federal judiciary regardless of the

particular authority under which Congress acted, or intended to act.

To be sure, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth* v. *Levine*, 555 U.S. 555, 565 (2009). But this inquiry into congressional intent, to determine "the scope of the statute's pre-empti[ve effect]," *Medtronic*, 518 U.S. at 485-86, goes to the merits of the preemption question, not to the antecedent question of whether a cause of action is available to enjoin the operation of preempted state law. See, *e.g.*, *Verizon Md.*, 535 U.S. at 642-43 (addressing merits of preemption claim without expressly resolving validity of the cause of action). This Court never has held that a state law may operate in contravention of a valid federal statute because of the particular power under which Congress proceeded. To the contrary, so long as the federal statute is constitutional and applicable, and is contrary to the state law, the state law is invalid, *Crosby*, 530 U.S. at 372, and a preemption cause of action should be available.

Federal statutes enacted pursuant to Congress's Article I spending power are no exception. It is well-established that Congress "may fix the terms on which it shall disburse federal money to the States," *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981), and once a State accepts federal money subject to such conditions, a state law contravening those conditions "runs afoul of the Supremacy Clause." *Lawrence Cnty.*, 469 U.S. at 270; see *Bacon*, 457 U.S. at 145-46 ("Because [the state rules] conflict with a valid federal regulation, they are invalid under the Supremacy Clause.").[12] The

[12] *See also Ahlborn*, 547 U.S. at 292; *Bennett* v. *Arkansas*, 485 U.S. 395, 397 (1988) (per curiam); *Townsend* v. *Swank*, 404 U.S. 282, 285 (1971); *King* v. *Smith*, 392 U.S. 309, 333 (1968).

only difference between a federal statute enacted under the Spending Clause and one enacted under another constitutional provision, such as the Necessary and Proper Clause, is that a Spending Clause statute is constitutionally applicable to a State only insofar as the State satisfies the condition precedent of accepting federal funding.

It is therefore unsurprising that, in *PhRMA*, seven Justices agreed that a plaintiff may bring a preemption claim to challenge a state law as invalid under the Medicaid Act. While these Justices differed over whether preemption had been established on the merits, they agreed on the threshold issue that the claim was available. 538 U.S. at 662 (plurality); *id.* at 671 (Breyer, J., concurring); *id.* at 687 (O'Connor, J., dissenting). The United States suggests that *PhRMA* arose in a different context because the plaintiffs there sought to invalidate a regulation affecting their "primary conduct," U.S. Br. 32 n.12. But it is immaterial under the Supremacy Clause whether state legislation regulates "conduct" or limits "benefits." If the challenged legislation contravenes federal law, it is invalid. See, *e.g.*, *Bacon*, 457 U.S. at 145-46 (holding state law excluding individuals from benefits of federal-state program, in violation of program conditions, "invalid under the Supremacy Clause").

Likewise, a rule limiting constitutional preemption claims to only those circumstances in which the plaintiffs assert them as anticipatory defenses to state enforcement actions, U.S. Br. 20, would run counter to many of this Court's decisions. See, *e.g.*, *Osborn*, 22 U.S. at 838 (entering injunction to provide restitution); *Rowe*, 552 U.S. at 371-73 (enjoining enforcement of regulation that directly targeted retailers rather than plaintiff motor carriers); *Engine*

Mfrs. Ass'n v. *S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 255 (2004) (enjoining enforcement of regulation that directly targeted car buyers rather than plaintiff manufacturers); *Am. Trucking*, 133 S. Ct. at 2104 (enjoining enforcement of regulation with sanctions enforceable against terminal operators rather than plaintiff trucking companies). Moreover, it would undermine the fundamental purpose of the Supremacy Clause, by enabling States to violate federal law with impunity, so long as they implemented them through artful or self-executing mechanisms.

B. The Structure Of Spending Clause Legislation Does Not Preclude A Preemption Claim.

Nor can statutes enacted pursuant to Spending Clause authority be treated differently merely because they are "conditional," and based on a State's continued participation in the federal program. See Petrs. Br. 49-54; see also U.S. Br. 21-23.

1. Petitioners argue that a State's ability to stop accepting federal money—and thereby escape the reach of conditions imposed by a Spending Clause statute—precludes an action under the Supremacy Clause by parties injured as a result of the State's noncompliance. But, although this Court has analogized federal-state programs such as Medicaid to a "contract" between sovereigns, *Pennhurst*, 451 U.S. at 17, that analogy has not been used to limit the federal statutes' preemptive reach, *e.g.*, *Bennett* v. *Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985). Indeed, this Court has specifically counseled against extending the analogy in that way. *E.g.*, *Barnes* v. *Gorman*, 536 U.S. 181, 186 (2002) ("[W]e have been careful not to imply that *all* contract-law rules apply

to Spending Clause legislation."). Petitioners' argument on this score fails for several reasons.

First, this Court has consistently maintained the propriety of injunctions that compel a State's compliance with federal funding conditions, so long as the State remains subject to those conditions. See, *e.g.*, *King* v. *Smith*, 392 U.S. 309, 333 (1968); *Rosado* v. *Wyman*, 397 U.S. 397, 420-21 (1970); cf. *Pennhurst*, 451 U.S. at 30 n.23 (noting that the Court "would have little difficulty" upholding an injunction that forced the State to choose between "rejecting federal funds ... or complying with" the conditions placed upon those funds). A State has no right to accept federal funding while claiming immunity from the federal obligations attached to those funds. *E.g.*, *King*, 392 U.S. at 333. If it finds those conditions unduly burdensome, it may discontinue accepting the funds to which the burden is attached. See *Rosado*, 397 U.S. at 420-21 (explaining that an injunction leaves a State with the "alternative choices of assuming the additional cost of [complying with the federal condition] or not using federal funds").

For this reason, state entities—like petitioners here—have less rather than more reason to complain about a cause of action seeking to hold them to compliance with the federal statute. If the State wishes to avoid the consequences of acting in a fashion inconsistent with federal law, including an action under the Supremacy Clause, it at all times carries an immunity simply by rejecting further funding and thereby avoiding future preemption.

Second, there is no basis for allowing only "intended" "third-party beneficiaries" of the statute to bring a preemption claim when a State violates that statute. U.S. Br. 22-23. Although contract law generally allows a third party to "enforce [a] contract"

only when it was "made for his benefit," 9 John E. Murray, Jr., *Corbin on Contracts* § 44.1, at 45 (rev. ed. 2007), that principle—even if it were properly applied by analogy in this context—would affect only actions brought under the quasi-contractual statute itself. It would not affect preemption actions brought under the Supremacy Clause, seeking not to "enforce" the statute, but to prevent injury caused by operation of a constitutionally invalid state law.[13]

If anything, the analogy to contract law supports the availability of preemption claims based on Spending Clause enactments. Contracting parties operate against a backdrop of default legal rules that govern the interpretation of their agreement. See, *e.g.*, Restatement (Second) of Contracts § 5(2) & cmt. b (1981). When a State accepts federal funding and agrees to be bound by certain conditions, the terms of the relevant "contract" include the constitutional provisions that structure relations between the federal and state governments—including the Supremacy Clause. And, because the Supremacy Clause has for two centuries been treated as providing a cause of action for individuals aggrieved by a preempted state law, *supra* Part I.B, a State that accepts funding under a federal statutory program undeniably does so recognizing that a cause of action under the Supremacy Clause will be available to enjoin state action that violates the federal law.

2. A preemption claim under the Supremacy Clause is no less available when, as here, the State's

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[13] For this reason, the decision in *Astra USA, Inc.* v. *Santa Clara County*, 131 S. Ct. 1342 (2011), is inapposite. There, the plaintiffs sought to enforce the terms of the statute itself, as embodied in a form contract through which the statute was implemented. *Id.* at 1345. Here, the claims at issue arise under the Constitution.

noncompliance with federal law might also trigger a withdrawal of funding by the federal government. Whatever authority Congress might have to displace particular constitutional remedies for certain constitutional violations, this Court never has held that an administrative funding-withdrawal mechanism, without more, is sufficient to demonstrate congressional intent to displace a right of action under the Constitution. To the contrary, this Court repeatedly has held that the possibility of federal funding withdrawal does not preclude judicial relief for parties injured by non-complying States. See, *e.g.*, *Rosado*, 397 U.S. at 420 ("We have considered and rejected the argument that a federal court is without power to ... prohibit the use of federal funds by the States in view of the fact that Congress has [delegated] the power to cut off federal funds for noncompliance with statutory requirements."); see also *Ark. Dep't of Health & Human Servs.* v. *Ahlborn*, 547 U.S. 268, 272 (2006) (state law "contravened federal [Medicaid provision] and was therefore unenforceable").[14]

These cases confirm that the possibility of funding withdrawal does not substitute for, and cannot

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[14] These decisions are consistent with this Court's approach to claims under § 1983, which are not displaced by funding-withdrawal provisions. *See, e.g.*, *Wilder* v. *Va. Hosp. Ass'n*, 496 U.S. 498, 522 (1990); *Wright* v. *City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 428 (1987). Similarly, the possibility of administrative funding withdrawal, without more, is insufficient to override evidence that Congress intended to provide a private right of action under a statute. *See Cannon*, 441 U.S. at 704-06. In this latter category of cases, of course, the relevant inquiry is not whether Congress intended to preclude an action otherwise available, but whether it intended to create a right of action in the first instance. *See, e.g.*, *Sandoval*, 532 U.S. at 286.

displace, a constitutional preemption claim. Whereas a preemption claim seeks to declare a state law void, the withdrawal of funding effectively accomplishes the opposite, eliminating the applicability of federal requirements. See *Rosado*, 397 U.S. at 420. And, although the *threat* of funding withdrawal may be a useful tool in inducing compliance, its actual implementation ultimately harms, rather than helps, those who would bring a preemption cause of action under the Supremacy Clause—the individuals who depend upon or otherwise benefit from federal regulatory programs. Cf. *Cannon*, 441 U.S. at 704-06 (explaining that funding withdrawal is a "severe" tool that "often may not provide an appropriate means" of addressing "isolated violation[s]").

More fundamentally, petitioners' argument that the mere *possibility* of funding withdrawal might displace a preemption claim reflects a critical misunderstanding of the Supremacy Clause. That Clause renders void state law that is inconsistent with any currently applicable federal statute, whether or not that inconsistency might at some later date be resolved. This Court recently recognized precisely this point, refusing to uphold a preempted state law based on "conjectures" regarding "hypothetical federal action[s]" that might later validate that law. *PLIVA*, 131 S. Ct. at 2579 & n.6. Likewise here, although there is always a possibility that a withdrawal of federal funding may render the federal statute inapplicable, that imagined possibility cannot validate state laws that currently conflict with a federal statute. Nor can they preclude a right of action to challenge those laws as void under the Supremacy Clause.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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